



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XB850]

Taking of Threatened or Endangered Marine Mammals Incidental to Commercial Fishing Operations; Issuance of Permit

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The National Marine Fisheries Service (NMFS) is issuing a permit to authorize the incidental, but not intentional, take of specific Endangered Species Act (ESA)-listed marine mammal species or stocks under the Marine Mammal Protection Act (MMPA), in the California (CA) thresher shark/swordfish drift gillnet fishery and the corresponding high seas component of the fishery as defined on the MMPA List of Fisheries as the Pacific highly migratory species drift gillnet fishery.

DATES: The permit is effective for a three-year period beginning [*insert date of publication in the **FEDERAL REGISTER***].

ADDRESSES: Reference materials for the permit including the final negligible impact determination are available on the Internet at:

<https://www.fisheries.noaa.gov/action/negligible-impact-determination-and-mmpa-section-101a5e-authorization-ca-thresher-shark> or

<https://www.regulations.gov/docket/NOAA-NMFS-2021-0105>. Other supporting information is available on the Internet including: recovery plans for the ESA-listed marine mammal species, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>; 2021 MMPA List of Fisheries (LOF), <https://www.fisheries.noaa.gov/national/marine-mammal->

protection/list-fisheries-summary-tables; the most recent Marine Mammal Stock Assessment Reports (SAR) by region, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region>, and stock, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-species-stock>; and Take Reduction Teams and Plans, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams>.

FOR FURTHER INFORMATION CONTACT: Tina Fahy, NMFS West Coast Region, (562) 980-4023, Christina.Fahy@noaa.gov; or Jaclyn Taylor, NMFS Office of Protected Resources, (301) 427-8402, Jaclyn.Taylor@noaa.gov.

SUPPLEMENTARY INFORMATION: The MMPA requires NMFS to authorize the incidental take of ESA-listed marine mammals in commercial fisheries provided it can make the following determinations: (1) the incidental mortality and serious injury (M/SI) from commercial fisheries will have a negligible impact on the affected species or stocks; (2) a recovery plan for all affected species or stocks of threatened or endangered marine mammals has been developed or is being developed; and (3) where required under MMPA section 118, a take reduction plan has been developed or is being developed, a monitoring program is implemented, and vessels participating in the fishery are registered. NMFS has determined that the CA thresher shark/swordfish drift gillnet/Pacific highly migratory species drift gillnet fishery meets these three requirements and is issuing a permit to the fishery to authorize the incidental take of ESA-listed marine mammal species or stocks (CA/OR/WA stock of humpback whale and CA/OR/WA stock of sperm whale) under the MMPA for a period of three years.

Background

The MMPA List of Fisheries (LOF) classifies each commercial fishery as a Category I, II, or III fishery based on the level of mortality and injury of marine

mammals occurring incidental to each fishery as defined in 50 CFR 229.2. Category I and II fisheries must register with NMFS and are subsequently authorized to incidentally take marine mammals during commercial fishing operations. However, that authorization is limited to those marine mammals that are not listed as threatened or endangered under the ESA. Section 101(a)(5)(E) of the MMPA, 16 U.S.C. 1371, states that NMFS, as delegated by the Secretary of Commerce, for a period of up to three years shall allow the incidental, but not intentional, taking of marine mammal stocks designated as depleted because of their listing as an endangered species or threatened species under the ESA, 16 U.S.C. 1531 *et seq.*, by persons using vessels of the United States and those vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1824(b), while engaging in commercial fishing operations, if NMFS makes certain determinations. NMFS must determine, after notice and opportunity for public comment, that: (1) incidental M/SI from commercial fisheries will have a negligible impact on the affected species or stock; (2) a recovery plan has been developed or is being developed for such species or stock under the ESA; and (3) where required under section 118 of the MMPA, a monitoring program has been established, vessels engaged in such fisheries are registered in accordance with section 118 of the MMPA, and a take reduction plan has been developed or is being developed for such species or stock.

The LOF includes a list of marine mammal species or stocks incidentally killed or injured in each commercial fishery. We evaluated ESA-listed stocks or species included on the final 2021 MMPA LOF as killed or seriously injured following NMFS' Procedural Directive 02-238 "Process for Distinguishing Serious from Non-Serious Injury of Marine Mammals." Based on this evaluation, we proposed to issue a permit under MMPA section 101(a)(5)(E) to vessels registered in the Category II CA thresher shark/swordfish drift gillnet/Pacific highly migratory species drift gillnet fishery, as classified on the final

2021 MMPA LOF, to incidentally kill or seriously injure the CA/OR/WA stock of humpback whale and CA/OR/WA stock of sperm whale (86 FR 71423; December 16, 2021).

NMFS will regularly evaluate other commercial fisheries for purposes of making a negligible impact determination (NID) and issuing section 101(a)(5)(E) authorizations with the annual LOF as new information becomes available. More information about the CA thresher shark/swordfish drift gillnet and Pacific highly migratory species drift gillnet fishery is available in the 2021 MMPA LOF (86 FR 3028; January 14, 2021) and on the Internet at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables>.

We reviewed the best available scientific information to determine if the fishery met the three requirements of MMPA section 101(a)(5)(E) for issuing a permit. This information is included in the 2021 MMPA LOF (86 FR 3028; January 14, 2021), the SARs for these species (available at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports>), recovery plans for these species (available at: <https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>), and other relevant information, as detailed further in the documents describing the preliminary and final determinations supporting the permit (available at: <https://www.regulations.gov/docket/NOAA-NMFS-2021-0105>).

NMFS is in the process of revising humpback whale stock structure under the MMPA in light of the 14 Distinct Population Segments (DPSs) established under the ESA (81 FR 62259, September 8, 2016), and based on the “Procedural Directive 02-204-03: Reviewing and Designating Stocks and Issuing Stock Assessment Reports under the Marine Mammal Protection Act” (NMFS 2019). The humpback whale DPSs that occur in waters under the jurisdiction of the United States do not align with the existing MMPA

stocks. Some of the listed DPSs partially coincide with the currently defined stocks. Because we cannot manage one portion of an MMPA stock as ESA-listed and another portion of a stock as not ESA-listed, until such time as the MMPA stock designations are revised, NMFS continues to use the existing MMPA stock structure for MMPA management purposes (*e.g.*, selection of a recovery factor, stock status) and treats such stocks as ESA-listed if a component of that stock is listed under the Act and overlaps with the analyzed commercial fishery. Therefore, for the purpose of this MMPA 101(a)(5)(E) authorization, NMFS considered the CA/OR/WA stock of humpback whale to be ESA-listed as it overlaps with the two ESA-listed DPSs (Mexico, and Central America).

Basis for Determining Negligible Impact

Prior to issuing a MMPA 101(a)(5)(E) permit to take ESA-listed marine mammals incidental to commercial fishing, NMFS must determine if the M/SI incidental to commercial fisheries will have a negligible impact on the affected marine mammal species or stocks. NMFS satisfies this requirement by making a NID. Although the MMPA does not define “negligible impact,” NMFS has issued regulations providing a qualitative definition of “negligible impact,” defined in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Criteria for Determining Negligible Impact

NMFS relies on a quantitative approach for determining negligible impact detailed in NMFS Procedural Directive 02-204-02 (directive), “Criteria for Determining Negligible Impact under MMPA section 101(a)(5)(E),” which became effective on June 17, 2020 (NMFS 2020). The procedural directive is available online at:

<https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy->

directives. The directive describes NMFS' process for determining whether incidental M/SI from commercial fisheries will have a negligible impact on ESA-listed marine mammal species/stocks (the first requirement necessary for issuing a MMPA section 101(a)(5)(E) permit as noted above).

The directive first describes the derivation of two Negligible Impact Thresholds (NIT), which represent levels of removal from a marine mammal species or stock. The first, Total Negligible Impact Threshold (NIT_t), represents the total amount of human-caused M/SI that NMFS considers negligible for a given stock. The second, lower threshold, Single NIT (NIT_s) represents the level of M/SI from a single commercial fishery that NMFS considers negligible for a stock. NIT_s was developed in recognition that some stocks may experience non-negligible levels of total human-caused M/SI but one or more individual fisheries may contribute a very small portion of that M/SI, and the effect of an individual fishery may be considered negligible.

The directive describes a detailed process for using these NIT values to conduct a NID analysis for each fishery classified as a Category I or II fishery on the MMPA LOF. The NID process uses a two-tiered analysis. The Tier 1 analysis first compares the total human-caused M/SI for a particular stock to NIT_t. If NIT_t is not exceeded, then all commercial fisheries that kill or seriously injure the stock are determined to have a negligible impact on the particular stock. If NIT_t is exceeded, then the Tier 2 analysis compares each individual fishery's M/SI for a particular stock to NIT_s. If NIT_s is not exceeded, then the commercial fishery is determined to have a negligible impact on that particular stock. For transboundary, migratory stocks, because of the uncertainty regarding the M/SI that occurs outside of U.S. waters, we assume that total M/SI exceeds NIT_t and proceed directly to the Tier 2 NIT_s analysis. If a commercial fishery has a negligible impact across all ESA-listed stocks, then the first of three findings necessary for issuing a MMPA 101(a)(5)(E) permit to the commercial fishery has been met (*i.e.*, a

NID). If a commercial fishery has a non-negligible impact on any ESA-listed stock, then NMFS cannot issue a MMPA 101(a)(5)(E) permit for the fishery to incidentally take ESA-listed marine mammals.

These NID criteria rely on the best available scientific information, including estimates of a stock's minimum population size and human-caused M/SI levels, as published in the most recent SARs and other supporting documents, as appropriate. Using these inputs, the quantitative negligible impact thresholds allow for straightforward calculations that lead to clear negligible or non-negligible impact determinations for each commercial fishery analyzed. In rare cases, robust data may be unavailable for a straightforward calculation, and the directive provides instructions for completing alternative calculations or assessments where appropriate.

Negligible Impact Determination

NMFS evaluated the impact of the CA thresher shark/swordfish drift gillnet/Pacific highly migratory species drift gillnet fishery using the process outlined in the directive, and, based on the best available scientific information, made a NID.

The CA/OR/WA stock of humpback whale is a transboundary stock. As noted above, because of the uncertainty regarding M/SI that occurs outside of U.S. waters for transboundary stocks, we assumed that total M/SI exceeds NIT_t and proceeded directly to the Tier 2 NIT_s analysis. The most recent (draft 2021) CA/OR/WA humpback whale SAR has documented M/SI of the CA/OR/WA stock of humpback whale incidental to this fishery (Carretta *et al.* 2021).

The estimated annual M/SI of humpback whales (CA/OR/WA stock) in the CA drift gillnet fishery is 0.1, based on observer data. Since this M/SI (0.1) is less than NIT_s (2.48), NMFS determined that the CA drift gillnet fishery/Pacific highly migratory species drift gillnet fishery has a negligible impact on the CA/OR/WA stock of

humpback whales (see accompanying MMPA 101(a)(5)(E) determination document linked above for NIT calculations).

The draft 2021 SAR includes the mean annual total commercial fishery-related M/SI (≥ 25.2) for the CA/OR/WA stock of humpback whale. This comprises M/SI from all commercial fisheries, including the CA thresher shark/swordfish drift gillnet fishery, as well as fishery-related M/SI for the stock not assigned to a specific commercial fishery. The SAR also includes unattributed fishery-related M/SI (11.15) for the stock, which is not assigned to a specific commercial fishery. This unattributed fishery-related M/SI could be from any number of commercial, recreational or tribal fisheries, including the CA thresher shark/swordfish drift gillnet fishery. In accordance with NMFS Procedural Directive 02-204-02, because data are not currently available to assign the unattributed fishery-related M/SI to a specific commercial fishery, we did not include unattributed mortality in the calculations for the NID Tier 2 analysis (NMFS 2020).

In addition, because the CA/OR/WA humpback whale stock is considered a transboundary stock, NMFS assumed NIT_t is exceeded and conducted the more conservative Tier 2 analysis with the lower NIT_s criterion. NMFS is actively monitoring the CA thresher shark/swordfish drift gillnet fishery through a fishery observer program. Further, most of the information on large whale entanglements on the West Coast is reported to and documented by the West Coast Large Whale Entanglement Response Program. If additional fishery-related M/SI of the CA/OR/WA stock of humpback whale is documented through the observer program or West Coast Large Whale Entanglement Response Program that indicates additional M/SI of the CA/OR/WA stock of humpback whale in the CA thresher shark/swordfish drift gillnet fishery, then NMFS will re-evaluate the NID and the permit.

The CA/OR/WA stock of sperm whale is not a transboundary stock. Therefore, we conducted the NID analysis starting with the Tier 1 (NIT_t) analysis. The most recent

(final 2020) CA/OR/WA sperm whale SAR documented M/SI of the CA/OR/WA stock of sperm whale incidental to this fishery (Carretta et al. 2021). The total annual average human-caused M/SI for the CA/OR/WA stock of sperm whales from 2013-2017 is 0.64, including 0.4 per year for the CA thresher shark/swordfish drift gillnet fishery and 0.24 per year for the sablefish hook and line fishery (Carretta et al. 2021). There was no other human-related M/SI of the CA/OR/WA stock of sperm whale reported during this time period. Since M/SI (0.64) is less than NIT_t (2.54), the CA drift gillnet fishery/Pacific highly migratory species drift gillnet fishery is considered to have a negligible impact on the CA/OR/WA stock of sperm whales.

The NID analysis is presented in an accompanying MMPA 101(a)(5)(E) determination document that provides summaries of the information used to evaluate each ESA-listed stock documented on the 2021 MMPA LOF as killed or injured incidental to the fishery (available at: <https://www.fisheries.noaa.gov/action/mmpa-list-fisheries-2021>). The final MMPA 101(a)(5)(E) determination document is available at: <https://www.fisheries.noaa.gov/action/negligible-impact-determination-and-mmpa-section-101a5e-authorization-ca-thresher-shark> or <https://www.regulations.gov/docket/NOAA-NMFS-2021-0105>. Based on the criteria outlined in the directive, the most recent SAR, and the best available scientific information, NMFS has determined that the M/SI incidental to the Category II CA thresher shark/swordfish drift gillnet/Pacific highly migratory species drift gillnet fishery will have a negligible impact on the associated ESA-listed marine mammal stocks (CA/OR/WA stock of humpback whale and CA/OR WA stock of sperm whale). Accordingly, this MMPA 101(a)(5)(E) requirement is satisfied for the commercial fishery (see MMPA 101(a)(5)(E) determination document is available at: <https://www.regulations.gov/docket/NOAA-NMFS-2021-0105>).

Recovery Plan

Recovery plans for humpback whales and sperm whales have been completed (see <https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>). Accordingly, the requirement to have recovery plans in place or being developed is satisfied.

Take Reduction Plan

Subject to available funding, MMPA section 118 requires the development and implementation of a Take Reduction Plan (TRP) for each strategic stock that interacts with a Category I or II fishery. The stocks considered for this permit are designated as a strategic stock under the MMPA because the stocks, or a component of the stocks, are listed as threatened or endangered under the ESA (MMPA section 3(19)(C)).

The CA thresher shark/swordfish drift gillnet fishery, for the affected marine mammal species or stocks, has a TRP in place. Accordingly, the requirement under MMPA section 118 to have TRPs in place or in development is satisfied (see determination supporting the permit available on the Internet at <https://www.regulations.gov/docket/NOAA-NMFS-2021-0105>).

Monitoring Program

Under MMPA section 118(d), NMFS is to establish a program for monitoring incidental M/SI of marine mammals from commercial fishing operations. The CA thresher shark/swordfish drift gillnet/Pacific highly migratory species drift gillnet fishery has been observed by NMFS since 1990. Accordingly, the requirement under MMPA section 118 to have a monitoring program in place is satisfied.

Vessel Registration

MMPA section 118(c) requires that vessels participating in Category I and II fisheries register to obtain an authorization to take marine mammals incidental to fishing activities. NMFS has integrated the MMPA registration process, implemented through the Marine Mammal Authorization Program, with existing state and Federal fishery

license, registration, or permit systems for Category I and II fisheries on the LOF.

Therefore, the requirement for vessel registration is satisfied.

Conclusions for Permit

Based on the above evaluation for the CA thresher shark/swordfish drift gillnet/Pacific highly migratory species drift gillnet fishery as it relates to the three requirements of MMPA section 101(a)(5)(E), we are issuing a MMPA 101(a)(5)(E) permit to the CA thresher shark/swordfish drift gillnet/Pacific highly migratory species drift gillnet fishery to authorize the incidental take of ESA-listed species or stocks during commercial fishing operations. If, during the three-year authorization, there is a significant change in the information or conditions used to support any of these determinations, NMFS will re-evaluate whether to amend or modify the authorization, after notice and opportunity for public comment.

ESA Section 7 and National Environmental Policy Act Requirements

ESA section 7(a)(2) requires federal agencies to ensure that actions they authorize, fund, or carry out do not jeopardize the existence of any species listed under the ESA, or destroy or adversely modify designated critical habitat of any ESA-listed species. The effects of the CA thresher shark/swordfish drift gillnet/Pacific highly migratory species drift gillnet fishery on ESA-listed marine mammals, were analyzed in the appropriate ESA section 7 Biological Opinion on the commercial fishery, and incidental take was exempted for those ESA-listed marine mammals for the fishery.

Under section 7 of the ESA, Biological Opinions analyze the effects of the proposed action on ESA-listed species and their critical habitat and, where appropriate, exempt anticipated future take of ESA-listed species as specified in the incidental take statement. Under MMPA section 101(a)(5)(E), NMFS analyzes previously documented M/SI incidental to commercial fisheries through the NID process, and when the necessary findings can be made, issues a MMPA section 101(a)(5)(E) permit that allows for an

unspecified amount of incidental taking of specific ESA-listed marine mammal stocks while engaging in commercial fishing operations. Thus, the applicable standards and resulting analyses under the MMPA and ESA differ, and as such, may not always align.

The National Environmental Policy Act (NEPA) requires Federal agencies to evaluate the impacts of alternatives for their actions on the human environment. Because the permit would not modify any fishery operation and the effects of the fishery operations have been evaluated in accordance with NEPA, no additional NEPA analysis beyond that conducted for the associated Fishery Management Plan is required for the permit. Issuing the permit would have no additional impact on the human environment or effects on threatened or endangered species beyond those analyzed in these documents.

Public Comments

On December 16, 2021, NMFS published a notice and request for comments in the **Federal Register** for the proposed issuance of a permit under MMPA section 101(a)(5)(E) to vessels registered in the CA thresher shark/swordfish drift gillnet/Pacific highly migratory species drift gillnet fishery (86 FR 71423). The public comment period closed on January 18, 2022. NMFS received three comment letters on the proposed issuance of the permit and underlying preliminary determination. Oceana opposed issuing the permit. In addition, two non-substantive comment letters from members of the public opposed issuing the permit. Only responses to substantive comments pertaining to the proposed permit and preliminary determination under MMPA section 101(a)(5)(E) are addressed below.

Comment 1: Oceana incorporates their previous comments submitted on the NMFS' draft "Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)."

Response: Oceana's comments on the draft "Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)" were previously addressed by NMFS and are

available at: <https://www.fisheries.noaa.gov/action/criteria-determining-negligible-impact-under-mmpa-section-101a5e>.

Comment 2: Oceana states that the existing monitoring program for the CA drift gillnet fishery does not meet the MMPA's requirement to provide statistically-reliable M/SI estimates. They note that observer coverage has averaged 20 percent annually, despite recommendations from the Pacific Fishery Management Council (Council) to achieve 100 percent observer coverage. Oceana asserts that 20 percent observer coverage is inadequate to accurately document marine mammal M/SI in the fishery. Oceana recommends NMFS not issue the MMPA 101(a)(5)(E) permit until the CA drift gillnet fishery is observed at 100 percent.

Response: NMFS disagrees that the monitoring program for the CA thresher shark/swordfish drift gillnet is insufficient to fulfill the monitoring requirements of MMPA section 101(a)(5)(E). The CA thresher shark/swordfish drift gillnet fishery has been observed by NMFS since 1990. The observer program in the CA drift gillnet fishery collects data on all target and non-target species, including the incidental M/SI of marine mammals. NMFS scientists use data from the observer program to generate statistically-valid estimates of M/SI that are in the most recent SARs for the CA/OR/WA stocks of humpback whale and sperm whale. As such, it satisfies the requirement in MMPA section 101(a)(5)(E)(i)(III).

Comment 3: Oceana recommends NMFS implement the protected species hard caps for the CA drift gillnet fishery recommended by the Council before issuing the MMPA 101(a)(5)(E) permit to the fishery. They further state that NMFS should phase out and prohibit the use of large mesh drift gillnets and transition to a sustainable swordfish fishery. They note that in 2015 the Council recommended that NMFS increase observer coverage to 100 percent and set mortality and injury hard caps for nine sea turtle

and marine mammal species in the CA drift gillnet fishery. Oceana states that NMFS has not implemented either of the Council's recommendations.

Response: The Council's fishery management actions are taken to implement the Magnuson-Stevens Fishery Conservation and Management Act, and this permit is authorized under section 101(a)(5)(E) of the MMPA. In January 2020, the federal court in the Central District of California ordered NMFS to finalize its proposed "hard caps" rule, which would close the fishery upon reaching specified limits of interactions with protected species. NMFS had sought to withdraw its proposed hard caps rule, after public comment had demonstrated closures would cause fishermen economic hardships NMFS had not anticipated. In February 2021, the federal court in the District of Columbia vacated the rule, agreeing that NMFS had found that the rule did not comply with National Standard 7's requirement to, where practicable, minimize costs and avoid unnecessary duplication.

NMFS made a NID for the CA thresher shark/swordfish drift gillnet fishery's current bycatch using the process outlined in the directive, and, based on the best available scientific information (NMFS 2020). While implementation of future fishery management actions in the CA thresher shark/swordfish drift gillnet fishery could affect marine mammal bycatch rates, consideration of those actions are not relevant to or needed to support the determinations for this permit.

Comment 4: Oceana comments NMFS's NID is biased towards inflating PBR and underestimating M/SI in the CA drift gillnet fishery. They state that, in 2016, NMFS established separate DPSs for humpback whales, including the Mexican and Central American DPSs. However, both the SAR and NID combine the Mexican and Central American DPSs into the CA/OR/WA stock of humpback whale and do not consider declines in the humpback population since 2018.

Oceana also notes that the NID analysis does not include two observed entanglements in drift gillnet gear in 2021. They note that observer coverage for the 2021-22 fishing season is not yet available, as the fishing season has not concluded. However, using an estimate of 20 percent observer coverage, the two observed entanglements would be approximately five total takes using a ratio estimator approach.

Response: Humpback whales were listed globally as endangered under the ESA in 1970 (35 FR 18319). On September 8, 2016, NMFS published a final rule dividing the globally listed endangered humpback whale into 14 DPSs and categorizing four DPSs as endangered and one as threatened (81 FR 62259). NMFS is in the process of revising humpback whale stock structure under the MMPA in light of the 2016 final rule on humpback whale DPSs as established under the ESA. In doing so, NMFS is following the process laid out in “Procedural Directive 02-204-03: Reviewing and Designating Stocks and Issuing Stock Assessment Reports under the Marine Mammal Protection Act” (NMFS 2019). As noted by the commenter, the CA/OR/WA stock of humpback whales does not align with the DPSs established under the ESA and comprises animals from the endangered Central American DPS, the threatened Mexico DPS, and the unlisted Hawaii DPS.

Because we cannot manage one portion of an MMPA stock as ESA-listed and another portion of a stock as not ESA-listed, until humpback whale stock structure has been revised, NMFS continues to use the existing MMPA stock structure for MMPA management purposes, including NIDs and 101(a)(5)(E) authorizations. Therefore, for purposes of evaluating the impact of the CA thresher shark/swordfish drift gillnet fishery under the MMPA, NMFS used the current MMPA designation of the CA/OR/WA stock of humpback whales. In the case of the CA/OR/WA stock of humpback whales, for the purposes of this NID analysis, NMFS considers the entire stock to be endangered under the ESA and depleted under the MMPA. In addition, because the CA/OR/WA humpback

whale stock is considered to be transboundary, NMFS assumed NITt is exceeded and conducted the more conservative Tier 2 analysis with the lower NITs criterion.

The most recent (draft 2021) CA/OR/WA humpback whale SAR has documented M/SI of the CA/OR/WA stock of humpback whale incidental to this fishery (Carretta *et al.* 2021). The draft 2021 SAR includes observer data through the 2019 fishing season. NMFS anticipates that future SARs will incorporate bycatch estimates for the CA thresher shark/swordfish drift gillnet fishery that include recent observed M/SI in 2021 after they have been completed.

Given this approach and ongoing efforts to revise humpback whale stock structure in the Pacific, NMFS has proceeded with a final NID for the CA thresher shark/swordfish drift gillnet fishery with respect to the CA/OR/WA stock of humpback whales and is issuing a 101(a)(5)(E) permit for this fishery. Nevertheless, if, during the 3-year authorization, there is a significant change in the information or conditions used to support any of these determinations, including a change in MMPA stock structure and associated estimates of abundance and M/SI incidental to commercial fisheries, NMFS may re-evaluate the NID.

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Dated: May 5, 2022.

Kimberly Damon-Randall,

Director, Office of Protected Resources,

National Marine Fisheries Service.

